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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 367

FEDERAL POWER COMMISSION,

Petitioner,

vs.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF THE OREGON DIVISION OF THE IZAAK WALTON LEAGUE OF AMERICA, INC. AS AMICUS CURIAE, IN SUPPORT OF THE RESPONDENTS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 1035) is reported in 211 F.

(2d) 347; the opinion and order of the Federal Power Comission granting the license (R. II, 417-447) are reported at 92 P.U.R. (N.S.) 247.

JURISDICTION

The order of the Court of Appeals was entered February 18, 1954 (R. 1034). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U.S.C. Section 1254 (1), 49 Stat. 860, 16 U.S.C. 825 (1).

QUESTIONS PRESENTED

1. Did the Federal Power Commission have jurisdiction, power, and authority to authorize and to license the construction, operation, and maintenance of the proposed project in the absence of state authority to use, impound, and divert the waters of the Deschutes River, an internal, nonnavigable stream of the State of Oregon?

2. Did the United States Constitution delegate to the central government power to control the acquisition and use of nonnavigable streams?

3. Whether under the Desert Land Act of 1877 the Federal Government irrevocably and unconditionally surrendered or relinquished to the states, including the State of Oregon, whatever rights the government may have had to control the use of the waters of nonnavigable streams?

4. Whether under the Desert Land Act of 1877 the common law doctrine of riparian rights have been abrogated in Oregon?

5. Whether the Federal Power Commission may act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of nonnavigable streams?

6. Whether an applicant for a license under Section 9 (b) of the Federal Power Act must show the Federal Power Commission he has under the state law the right to divert the waters of a nonnavigable stream for the use of which he desires a license?

STATUTES INVOLVED

The statutes involved are adequately set forth in the Appendix to the Petition.

BRIEF OF AUTHORITIES

I.

The common-law doctrine of riparian rights has been virtually abrogated in Oregon and for practical purposes appears to be no longer more than a legal fiction.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240.

Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414.

II.

The above section abolishes the rule that a riparian owner has the right to have a stream continue to flow substantially undiminished in its natural channel.

California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. (2d) 555.

III.

The Oregon water code has been sustained as constitutional by the Supreme Court of the United States.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

IV.

The Desert Land Act (Act of Congress, March 3, 1877, amended 42 U.S.C.A. 321) had the effect to sever all waters upon the public domain, not theretofore appropriated, from the land itself.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

Brush v. Commissioners of Internal Revenue, 300 U.S. 352.

Ickes v. Fox, 300 U.S. 82, 57 S. Ct. 412.

V.

Under the federal Acts of 1866, 1870 and 1877 (Title 43, Section 661, United States Code Annotated) (14 Stat. 251, 16 Stat. 217) the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of non-navigable streams in the West.

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240.
California-Oregon Power Co. v. Beaver Portland Cement Company, 295 U.S. 142, 55 S. Ct. 725.
Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414.
Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452.
Broder v. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790.
United States v. Rio Grande D. & I. Company, 174 U.S. 690, 706, 19 S. Ct. 770.
Gutierres v. Albuquerque Land & Irrigation Company, 188 U.S. 545, 553, 23 S. Ct. 338.

VI.

The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States and hence such power properly belongs to the individual states.

Kansas v. Colorado, 206 U.S. 46, 94.
Fox v. Ickes, 137 Fed. (2d) 30.

VII.

Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law.

Federal Power Commission v. Niagara Mohawk Power Corporation, 347 U.S. 239, 74 S. Ct. 487.

VIII.

The legislative history of the Federal Power Act compels conclusion that it was not intended to automatically abolish pre-existing water rights on a nation-wide scale, but that it was intended to be merely regulatory.

Federal Power Commission v. Niagara Mohawk Power Corporation, 347 U.S. 239, 74 S. Ct. 487.

SUMMARY OF ARGUMENT

1. The decision below is in accord with the well recognized, long standing principles laid down by this Court. The court below decided no question in a manner not consistent with the interpretation of the Federal Power Act in prior decisions of this Court. The decision below is consistent with the decision of this Court in the recent case of *Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239, 74 S. Ct. 487, and with those earlier decisions in *California-Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 162, 55 S. Ct. 731, and in *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412. The decision below decided no important question of federal law which has not, but should be, settled by this Court.

2. The decision of the court below is not in conflict with the decision of another court of appeals. It is in accord with the laws of the State of Oregon.

3. The court below correctly held that:

a. By adoption, under Federal Power Act, of policy that Federal Power Commission is to work toward a constructive national program of intelligent, economical utilization of power resources, Congress did not and could not change state ownership or control of waters located within state.

b. Within certain limitations, sovereignty of Oregon extends over control of waters located within Oregon as definitely as over lands therein, but the federal government, has paramount rights in navigable streams under the commerce clause.

c. As owner of public domain, federal government possessed power to dispose of land and water thereon together or to dispose of them separately, and fair construction of the Desert Land Act is that Congress intended to establish rule that, for the future, land should be patented separately and that all nonnavigable waters thereon should be reserved for the use of public under laws of state and territories named.

d. Regulation of the Deschutes River as it flows through Oregon is one of powers of Oregon's sovereignty, and such power includes power to regulate fish in Oregon waters.

e. Whatever, if any, limitation there was upon Oregon's complete sovereignty over waters of the Deschutes River was wiped out by the Desert Land Act of 1877.

f The Federal Power Commission has legal right to give its approval to the construction of a hydroelectric plant on the Deschutes River in Oregon and had power to grant its permissive license to construction of such proposed dam upon federal property, but ownership of power dam site did not empower federal government to use waters of such river either at such site or elsewhere contrary to Oregon law.

g. The lands reserved for power purposes within the confines of the Pelton project were not lands referred to as reserved lands under the terms of The Desert Land Act, reaching that status long after The Desert Land Act became law, and then by order of the Secretary of the Interior. Thus, reservation by the Secretary of the Interior could not carry with it the right to the control of the waters of the Deschutes River.

h. The re-regulating dam and the lands flooded by the impoundment it creates are not lands over which the federal government exercises any authority and over which the Federal Power Commission has no jurisdiction.

ARGUMENT

This Brief Amicus Curiae on behalf of the Oregon Division of the Izaak Walton League of America, Inc. is presented under permission being granted by the petitioner and respondents, pursuant to Rule 42, Paragraph 2, of this Honorable Court and in support of the position of the respondents.

Since the statement of the case as presented in the briefs of petitioner and respondents adequately informs the Court, this brief will not add to the burden of the Honorable Court by an additional statement.

This Court has said in numerous decisions that the Desert Land Act (Act of Congress, March 3, 1877, amended 42 U.S.C.A. 321) had the effect to sever all waters upon the public domain not theretofore appropriated from the land itself.

California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. (2d) 555.
Brush v. Commissioners of Internal Revenue, 300 U.S. 352.
Ickes v. Fox, 300 U.S. 82, 57 S. Ct. 412.

Further, this Court has held that under the Acts of 1866, 1870 and 1877 (Title 43, Section 661, United States Code, Annotated) (14 Stat. 251, 16 Stat. 217) the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of non-navigable streams in the West.

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240.
California-Oregon Power Co. v. Beaver Portland Cement Company, 295 U.S. 142, 55 S. Ct. 725.
Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414.
Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452.
Broder v. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790.
United States v. Rio Grande D. & I. Company, 174 U.S. 690, 706, 19 S. Ct. 770.
Gutierres v. Albuquerque Land & Irrigation Company, 188 U.S. 545, 553, 23 S. Ct. 338.

Under the decisions above referred to the fundamental error of the petitioner's position can readily be seen, for at the time the acts referred to were passed by Congress the lands upon which the main structure will be built were public lands, a part of the public domain; and as such, according to decisions of this Court just cited, had the waters severed from the land itself and the control of those waters relinquished to the states. These lands remained a part of the public domain until first withdrawn by order of the Secretary of the Interior

December 30, 1909 (note 7, page 6, petitioner's brief). Subsequent orders of the Secretary of the Interior withdrew other lands for power purposes (notes 6 and 8, page 6, and note 20, page 23, petitioner's brief) until all the lands upon which the *main structure* and the lands flooded by the impoundment made by the *main structure* were withdrawn from public entry. These were not reserved lands embraced by the statutes, reaching reserved status long after the laws had been enacted by Congress and the policy regarding them had crystalized through many court decisions giving the states control of the waters of nonnavigable streams within their borders. The lands here involved were not reserved by an Act of Congress, but only by an order of the Secretary of the Interior. There is no doubt that the lands could be so reserved by such an order but that the right to control the waters flowing along or through those lands could be recaptured at the same time with such an order is unthinkable, for the Secretary of the Interior was never vested with such power or authority. Even the Congress could not take away rights it had granted to the states without following the due process clause of the Constitution, the clause which is so revered and has given so much stature and stability to our government.

We do not agree that the United States ever at any time had the right to legislate on the question of water rights particularly in *internal nonnavigable* waters, since such powers were never delegated to the United States by the individual states.

Kansas v. Colorado, 206 U.S. 46, 94.
Fox v. Ickes, 137 Fed. (2d) 30.

If the power to legislate relative to such waters was never delegated to the United States, a regulatory agency (*Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239, 74 S. Ct. 487) can not take unto itself that authority, and the order of the Federal Power Commission issuing license (major) and particularly Article 28 of that order (Tr. 443) can have no other interpretation than that the Federal Power Commission is determining and deciding the right to the use of the waters of the Deschutes River and its tributaries. The rather ridiculous position of the Federal Power Commission is plainly seen in its claim to riparian rights by reason of the reserved lands, a doctrine long abrogated in Oregon.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.
Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240.
Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414.

Yet in its order the Commission attempts to determine rights to the use of water elsewhere on the Deschutes River and its tributaries (Tr. 443). If the order of the Federal Power Commission is allowed to stand the chaos that will result with respect to water and its uses in the State of Oregon, as well as elsewhere in the West, can readily be seen.

The inconsistent position of the petitioner is further shown when we turn our attention to the re-regulating dam, a smaller structure of the proposed project which is to be erected across the Deschutes some three and one-half miles downstream from the main dam (Tr.

590). This structure will rest entirely on private lands, over which the federal government exercises no control (Appendix B. P. 17A Petitioner's Brief). Most, if not all, of the lands flooded by the impoundment created by the re-regulating dam are also private lands (Tr. 532 and 541). It is at the point of the re-regulating dam that the migration of the salmon and steelhead will be blocked and the fish taking facilities installed (Tr. 431 and 590). Where, we must ask, does the Federal Power Commission find the authority to grant a license to construct the re-regulating dam? Yet the license is for the project as a whole and entirely casts aside any contention made by the State of Oregon that a state grant of authority is necessary for any part of this project, even though some parts be constructed away from any lands over which the federal government has any authority. Carried to its ultimate, the Federal Power Commission could license any number of projects further on down the stream irerspective of the title or character of the lands involved, so long as those projects were in some way integrated with the main structure here and in turn control the entire stream and its tributaries above, by claiming the right to the uninterrupted flow of the stream past the Pelton site, on the basis of the riparian doctrine which has been abrogated in Oregon.

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240.

Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414.

No contention is made here that the applicant can construct the part of the facilities erected on or using federally owned or controlled lands without a license so to do from the Federal Power Commission, but the license can only be for permission to use that which the grantor owns or controls, and no more, which in this instance would be only permission to use federally owned lands within the project, and no other, and not to the use of any other lands or any of the waters. That permission must come from those who own the lands and from the State of Oregon which exercises control over the waters.

The wisdom of the Congress in enacting those laws commonly known as the "Desert Land Acts" is no longer open to question. They have resulted in the name "The Great American Desert" disappearing from the maps of this continent. So much of what was a desert has become a veritable Garden of Eden through the use of water under laws of the individual states. To sustain the position of the petitioner would not only place in jeopardy any further development such as has been experienced in the past with respect to the use of water but would certainly jeopardize much of the development of that nature already in existence and would bring chaos where there is now order.

The question is not whether the Federal Power Commission has required the applicant to provide facilities adequate to preserve the fisheries of the Deschutes River System or whether the rights of prior appropriators of water were protected, but whether the Federal Power

Commission has the authority or right to determine those rights in any manner or in any degree.

We submit that the Federal Power Commission had no such authority or right and that the United States Court of Appeals for the Ninth Circuit was correct when it said,

> "Underlying such holding is our opinion that the Commission has trenched upon the sovereignty of the State of Oregon. It is true that the Commission has gone a long way toward minimizing the harm which may result from the construction and operation of the Project, but it has done so, not as a legal requirement, but as a commendable grace which the Commission accords to the State. The fundamental principle, however, is not whether the Project will cause large, small, or any damage. It is that Oregon has the right to regulate its own waters in its own chosen way."
>
> Appendix B. P. 30a Petitioner's Brief

and that its decision should be upheld.

Respectfully submitted,

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